Supreme Court, U.S.
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No. 99-1796

IN THE

SUPREME COURT OF THE UNITED STATES

WHITEHEAD ASSOCIATES, INCORPORATED,
CHESAPEAKE OUTDOOR ENTERPRISES, INCORPORATED,
PNE MEDIA, INCORPORATED

Petitioners

v.

MONTGOMERY COUNTY COUNCIL,
MONTGOMERY COUNTY EXECUTIVE,
MONTGOMERY COUNTY, MARYLAND,

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where a facial challenge to the validity of a zoning ordinance focused solely upon whether State enabling legislation authorized the District Council to eliminate a nonconforming use, but did not assert any constitutional defect, and the statute of limitations barred the claim for damages, did the Court of Appeals commit reversible error in concluding that the statute of limitations barred the entire claim?

2. Does a cause of action regarding compensation under State law for removal of billboards accrue when the local ordinance is enacted, which means that a billboard company cannot sit on its rights and wait until the ordinance is enforced against it to file a lawsuit?

LIST OF PARTIES

The Petitioners in this proceeding are Whitehead Associates, Inc., Chesapeake Outdoor Enterprises, Inc., and PNE Media, LLC. Respondents are Montgomery County Council, Montgomery County Executive, and Montgomery County, Maryland.

CORPORATE DISCLOSURE

Montgomery County, Maryland, is a body corporate and politic, organized under the laws of the State of Maryland and the Charter of Montgomery County, Maryland, and as such has no corporate parents or subsidiaries. The Charter places the legislative power with the Montgomery County Council and the executive power with the Montgomery County Executive.

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Montgomery County Council, Montgomery County Executive, and Montgomery County, Maryland, respectfully oppose the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The unpublished opinion of the Court of Appeals is *Whitehead Associates, Inc. v. Montgomery County Council*, No. 98-2716, 2000WL 20577 (4th Cir. January 13, 2000). The opinions of the District Court also are unreported. All of these opinions appear in the appendix to the petition filed by Whitehead Associates, *et al.*

JURISDICTION

The Court of Appeals has entered its judgment, which this Court has the discretion to review by issuing a writ of certiorari under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Respondents adopt the provisions set forth in the petition for writ of certiorari.

STATEMENT OF THE CASE

Petitioners own three billboard structures located in Montgomery County. Since 1968, Montgomery County has enacted a series of ordinances seeking to remove billboards from within its boundaries. The 1968 ordinance restricted the height, placement, and width of outdoor advertising and ordered the removal of billboards that violated the law. Petitioner Whitehead had erected its billboards in 1965 and the ordinance gave it until 1972 to remove the signs. Whitehead did not remove its billboards, but applied to renew its permits. The County denied the applications for renewed permits, and Whitehead filed an administrative appeal from the denial, which was later dismissed.[1]

During the intervening years, the Council continued to seek removal of billboards and amended the ordinance several times. In 1986, the Council passed an ordinance that prohibited billboards in the County, and in 1992, the Council amended the ordinance to allow billboards that were lawful as of July 28, 1986, to remain standing for five years from July 13, 1992. (App. 2)[2] A comprehensive revision of the provisions of the Zoning Ordinance that govern signs occurred in 1997, but retained the 1986 prohibition and the 1992 amortization period. (App. 8)

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[1]Based on the subsequent amendments to the ordinance, the Circuit Court later dismissed the administrative appeal as moot.

[2]The pertinent language from this ordinance appears in the appendix to the petition and is referred to as "App." in this opposition.

In 1997, the County notified Whitehead that its billboards were in violation of the ordinance and must be removed. Rather than comply, Whitehead filed suit seeking declaratory and injunctive relief. In an amended complaint, Whitehead added a civil rights claim, and the County removed the case to federal district court.

REASONS FOR DENYING THE PETITION

This Court should not hear this case because the Petitioners have presented no compelling reason for review. The unpublished Court of Appeals decision does not involve an important federal question, does not conflict with another circuit, and does not conflict with a state court of last resort.

Petitioners make no claim that the County ordinance violates the federal constitution or otherwise affects a federal matter. Rather, the challenges asserted involve solely the application and interpretation of State and local laws that have no bearing on other jurisdictions. Petitioners simply assert that the Court of Appeals misapplied properly stated law. This case involves limited local interests and does not present sufficient grounds for consideration by the United States Supreme Court.

I.

THE COURT OF APPEALS REACHED THE CORRECT RESULT.

The Court of Appeals dismissed Petitioners' case based on the statute of limitations and affirmed the entry of summary judgment. The petition before this Court specifically eliminates any takings claim and relies solely upon whether the State enabling legislation authorizes Montgomery County to

enact an ordinance that eliminates a nonconforming use. This issue requires no federal analysis but only application of clear statutory construction principles to interpret the State law and the local ordinance. As a result, this case threatens no conflict with other federal circuits or within the Fourth Circuit, nor any relevant conflict with other states.

The Fourth Circuit did not violate its prior decision but adhered to established legal principles.

Although the Petitioners complain that the Court of Appeals failed to follow its prior published decision, a closer review of the case shows that the Court acted consistently with relevant precedent.

In *National Advertising Company v. City of Raleigh*, 947 F.2d 1158 (4th Cir. 1991), a billboard company challenged the City of Raleigh's zoning ordinance that created an amortization period for removing nonconforming billboards. National Advertising Company filed suit in 1989, which was more than three years after the City enacted the ordinance. Seeking relief under 42 U.S.C. § 1983, National Advertising Company alleged that the ordinance violated the First and Fourteenth Amendments and also resulted in a taking without just compensation.

In reaching its decision, the Court of Appeals specifically rejected National Advertising Company's theory that it did not suffer an injury until the amortization period expired and that the ordinance created a continuing cause of action. Preliminarily, the Court emphasized that the federal courts must borrow the statute of limitations from analogous state law. The Court ultimately held that, while the plaintiff could have

pursued a facial challenge to the ordinance immediately upon enactment, the claim for damages under the takings analysis also accrued at that time. In effect, the ordinance created an actual, concrete interference with the use of the property upon enactment by making clear that the use must cease within a specific period.

Having disposed of the takings claim, the Court turned to the contention that the ordinance was facially offensive to the First Amendment. The Court recognized the unlikelihood that a constitutional challenge could be evaded by the statute of limitations and proceeded to evaluate the merits of the claim. Relying on settled authority, the Court concluded that the ordinance did not violate the First Amendment. *See National Advertising Company,* 947 F.2d at 1168-1169; *see also, Major Media of the Southeast, Inc. v. City of Raleigh*, 792 F.2d 1269, 1272 (4th Cir. 1986) (citing *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 509-510 (1981)).

In the present case, the Court of Appeals applied the same analysis. Like the plaintiff in *National Advertising Company*, Petitioners challenge the amortization provision of the Montgomery County Zoning Ordinance and seek damages under 42 U.S.C. § 1983. The statute of limitations for Petitioners' claims is three years. *See Wilson v. Garcia*, 471 U.S. 261, 280 (1985); *National Advertising Company,* 947 F.2d at 1162; Md. Code Ann., Cts. & Jud. Proc. § 5-101 (1998 Repl. Vol.). Whitehead Associates, in its own capacity and as the predecessor in interest to Chesapeake Outdoor Enterprises and PNE Media, was on notice of its claim as early as 1968, when the County first imposed restrictions that made Whitehead's billboards illegal. *See National Advertising Company,* 947 F.2d at 1163; *Duke Street Limited Partnership v. Board of*

County Commissioners of Calvert County, 112 Md. App. 37, 51, 684 A.2d 40, 47 (1996), *cert. denied*, 344 Md. 566, 688 A.2d 445 (1997). Certainly, by 1992, the ordinance clearly alerted Whitehead to the termination of its use of billboards. Whitehead did not file suit until 1997, well after the expiration of the three-year statute of limitations.

Petitioners now assert that they do not challenge the statute as an unconstitutional taking, but instead, argue that the County did not have the authority from the State to enact the ordinance. Absent a claim of unconstitutionality, however, the constitutional analysis conducted by the Court of Appeals in *National Advertising Company* becomes inapposite to the present case. In the earlier case, the Court explained that it considered the facial challenge because National Advertising Company had invoked the First Amendment. Only the constitutional claim escaped the statute of limitations bar. Yet, because Petitioners assert no federal issue in this case, no further analysis is required. The application of the statute of limitations to bar the entire claim, therefore, remains consistent with the prior decision of the Court of Appeals.

The statute of limitations bars the challenge under the State enabling law, because no clear usurpation of authority exists.

Other than a constitutional challenge, only a clear usurpation of authority has supported consideration of a case after the statute of limitations has expired. For example, when a local government had no authority to impose a particular tax, the procedure established along with the tax was a nullity, and the Court reviewed a claim challenging the tax after the statutory time for appeal expired. *See Ogden v. Armstrong*, 168

U.S. 224, 237 (1897). On the other hand, a challenge to the validity of a statute based on omission of a procedural requirement did not withstand the defense that it was precluded by laches. *See Schaeffer v. Anne Arundel County*, 338 Md. 75, 80, 656 A.2d 751, 753 (1995). In neither case did a court allow a party to pursue a challenge to the validity of a statute when no clear usurpation of authority was apparent.

The present case similarly presents no clear usurpation of authority, but rather, reflects that the County has the requisite authority to enact the ordinance eliminating a nonconforming use. Montgomery County derives its zoning authority from the Regional District Act. Md. Ann. Code art. 28, § 8-101 (1997 Repl. Vol.); *Mossburg v. Montgomery County*, 329 Md. 494, 501, 620 A.2d 886, 889 (1993); *Chevy Chase View v. Rothman*, 323 Md. 674, 685, 594 A.2d 1131, 1136 (1991). The Act expressly authorizes the Montgomery County Council, sitting as the District Council, to exercise broad discretion to regulate the use of land within the County.

Petitioners contend that the Regional District Act does not permit the County to regulate nonconforming uses. Yet, the appellate courts of Maryland have interpreted the statute to permit regulation of nonconforming uses, including amortization. By their nature, nonconforming uses impinge upon the implementation of the zoning laws and should be "speedily" eliminated. *Grant v. Mayor and City Council of Baltimore*, 212 Md. 301, 307-308, 129 A.2d 363, 365 (1957). A lawful nonconforming use exists when an owner of land uses his land in a lawful manner before and at the time of the adoption of the original zoning ordinance, but a later legislative action makes the use nonpermitted. *Lone v. Montgomery County*, 85 Md. App. 477, 496, 584 A.2d 142, 151 (1991).

State law does not favor nonconforming uses because they "pose a formidable threat to the success of zoning" and "contribute to urban blight, imperil the success of the community plan, and injure property values." *Lone*, 85 Md. App. at 497, 584 A.2d at 152 (quoting *Prince George's County v. Gardner*, 293 Md. 259, 267, 443 A.2d 114, 118 (1982)). And the Maryland appellate courts repeatedly have ruled that local legislative bodies may require nonconforming uses to cease after a reasonable and appropriate time as a proper exercise of the police power. *Donnelly Advertising Corporation v. Mayor and City Council of Baltimore*, 279 Md. 660, 671, 370 A.2d 1127, 1133-1134 (1977); *Shifflett v. Baltimore County*, 247 Md. 151, 156, 230 A.2d 310, 312 (1967); *Lone*, 85 Md. App. at 498, 584 A.2d at 152; *Harris v. Mayor and City Council of Baltimore*, 35 Md. App. 572, 579, 371 A.2d 706, 710, *cert. denied*, 280 Md. 731 (1977).[3]

During more than four decades, the Maryland courts have recognized amortization as a "positive method" of eliminating nonconforming uses, including billboards. *Grant*, 212 Md. at 309, 129 A.2d at 366; *Chesapeake Outdoor Enterprises, Inc. v. Mayor and City Council of Baltimore*, 89 Md. App. 54, 75, 597 A.2d 503, 513 (1991); *see also, Lone,* 85 Md. App. at 508, 584 A.2d at 157 (affirming elimination of nonconforming boarding houses through 10-year amortization period). The appellate courts have interpreted the authority of the two counties within the Regional District no differently than the authority given to other counties. In *Gardner*, the Maryland

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[3]The Court of Appeals for the Fourth Circuit has decided amortization cases consistently with the state courts. *See National Advertising Company,* 947 F.2d at 1158; *see also Major Media,* 792 F.2d at 1269.

Court of Appeals recognized that "ordinances must be strictly construed in order to effectuate the purpose of eliminating nonconforming uses." 293 Md. at 268, 443 A.2d at 119. And in *Lone, supra*, the Maryland Court of Special Appeals specifically upheld Montgomery County's authority to eliminate nonconforming boardinghouses through amortization.

The Court of Appeals, therefore, acted consistently with its previous decision that the statute of limitations begins to run when the ordinance is enacted. Petitioners asserted no constitutional violation, and no usurpation of authority existed. Rather, the County Council has the clear authority to enact an ordinance that eliminates a nonconforming use. The Petition for Writ of Certiorari, therefore, should be denied.

Whitehead misstates the settled law in Maryland regarding jurisdiction.

As part of the contention that the statute of limitations does not bar its claim against Montgomery County, Petitioners characterize the issue as a challenge to the jurisdiction of the County Council and assert "[i]t is well settled law in Maryland that the question of jurisdiction can be raised at any time." *Petition* at 13. Although several citations follow this statement, none of the cases supports Petitioners' position.[4]

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[4]Petitioners' reference to the "reopener doctrine" provides no solace either, as the doctrine ordinarily applies when the language or provision a party challenges was revised or amended. The ordinance providing a five-year amortization period for Petitioners' billboards, however, appears virtually verbatim in the recent ordinance. (App. 8)

In each case, the appellate court of Maryland discussed its own jurisdiction over an issue that the party had not pursued before the trial court. Responding to an assertion that the issue had not been preserved for appellate review, the appellate courts referred to the well-settled law in Maryland that an appellate court may consider the jurisdiction of the trial court at any time. *See generally Stewart v. State*, 287 Md. 524, 413 A.2d 1337 (1980) (subject matter jurisdiction of trial court in criminal matter involving a juvenile); *Pedzich v. State*, 33 Md. App. 620, 365 A.2d 567 (1976) (whether challenge to jurisdiction of circuit court was preserved for appeal to Maryland Court of Special Appeals); *Tate v. State*, 236 Md. 312, 203 A.2d 882 (1964) (preservation of issue for appellate review); *Bowen v. State*, 206 Md. 368, 111 A.2d 844 (1955) (appellate review of jurisdiction based on challenge to venue); *Berlinsky v. Eisenberg*, 190 Md. 636, 59 A.2d 327 (1948) (jurisdiction of the lower court is always before the appellate court, whether or not it was passed on by the lower court).

The jurisdiction that Maryland permits to be challenged at any time is the jurisdiction of a court to entertain an action, not the authority of a legislative body to enact an ordinance regarding a particular subject. The preservation of issues before an appellate court differs completely from the authority that the State legislature has delegated to the County Council through a legislative enactment. Petitioners cite no case to support the claim that a challenge to the jurisdiction of the County Council could be pursued at any time. In fact, the decision of the Maryland Court of Appeals in *Schaeffer*, 338 Md. at 80, 656 A.2d at 753, suggests the contrary position that these challenges may become untimely.

II.

STATUTORY CONSTRUCTION PRINCIPLES REQUIRE THAT A LOCAL ZONING ORDINANCE BE CONSTRUED IN A MANNER THAT RECONCILES IT WITH STATE LAW.

Petitioners also contend that the County ordinance conflicts irreparably with the State law that provides compensation for the removal of billboards. Md. Ann. Code art. 25, § 122E (1998 Repl. Vol.). The same analysis discussed in the previous argument for barring Petitioners' claim applies here. When the County enacted its ordinance in 1992, the State law already existed, and Petitioners had ample notice of a claim for damages based on a perceived conflict between the two statutes. *See Duke Street Limited Partnership,* 112 Md. App. at 49, 684 A.2d at 46.

Even if Petitioners had brought their claims timely, however, the District Court aptly considered the statutory construction of the State law and local ordinance and concluded that no conflict existed. The State law provides for compensation in the form of the fair market value of the billboards, while the County ordinance provided a five-year amortization period in which the billboard owners could recoup the value of the property. (App. 15) The District Court reasonably determined that amortization and fair market value both address the concerns of just compensation. Logically, if amortization satisfies constitutional protections, it also must be consistent with "fair market value" under State law.

This interpretation adheres to standard principles of statutory construction in Maryland, which require that the statute be given its plain meaning and that it be read in context to effectuate the intent of the Legislature. *Armstead v. State*,

342 Md. 38, 56, 673 A.2d 221, 229 (1996). The interpretation given must use common sense to avoid illogical or unreasonable conclusions. *Frost v. State*, 336 Md. 125, 137, 647 A.2d 106, 112 (1994).

Moreover, the District Court reasonably inferred an inclination of the State's appellate courts to agree that an amortization period also constitutes "fair market value" under Article 25, § 122E. In *Chesapeake Outdoor Enterprises,* Maryland's Court of Special Appeals rejected a billboard owner's claim for compensation for signs that Baltimore City sought to remove. 89 Md. App. at 76, 597 A.2d at 514. The Court of Special Appeals ruled that the billboard owner could obtain no compensation under either Article 25, §122E or the "takings" provisions of the Maryland Constitution, because the signs were not lawfully maintained. *Id.* at 74, 597 A.2d at 513. The court further emphasized that, even if the signs had been lawful, the billboard owner would not have obtained relief, because it had enjoyed a 19-year amortization period. *Id.* at 75, 597 A.2d at 513-514. The court deemed that amortization period to provide sufficient compensation for any loss sustained by the billboard owner.

The same reasoning precludes relief for Petitioners in this case. Whitehead effectively has enjoyed a 32-year amortization period in which to recoup its losses. During that time, Whitehead has continued to collect an income stream that should have ended in 1970. Inasmuch as the County had prohibited billboards before the State enacted § 122E, there remains significant doubt as to whether the billboards met the prerequisite of having been lawfully maintained for purposes of receiving compensation under the State law.

As in *Chesapeake Outdoor Enterprises*, Whitehead and its successors either failed to maintain the billboards lawfully, precluding relief under State law, or enjoyed a 32-year amortization period. Either interpretation is reasonable and presents no constitutional issue for this Court to consider.

CONCLUSION

Montgomery County Council, Montgomery County Executive, and Montgomery County, Maryland, request that this Court deny the petition for writ of certiorari in this case. The petition presents no constitutional issue, nor any issue that affects or concerns other states. The case involves only the local issue of whether the County properly exercised the authority delegated by the State to enact an ordinance affecting a nonconforming use. The limited local impact of the unreported decision of the Court of Appeals does not merit review by this Court.

Respectfully submitted,

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